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Supreme Court, U.S.
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No. 94-1348

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

ROBERT THOMPSON and BRAD BAILEY,
Petitioners,

v.

ROD BOGGS, a Police Officer of the City of Havana, KEVIN W. NOBLE, a Police Officer of the City of Havana, then Chief of Police of the City of Havana, and THE CITY OF HAVANA, ILLINOIS,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I.

WHETHER THE COURT OF APPEALS CORRECTLY HELD THAT *CITY OF LOS ANGELES v. HELLER*, 475 U.S. 796 (1986) BARS A CLAIM FOR MUNICIPAL LIABILITY BASED ON A POLICY OF CONDONING EXCESSIVE FORCE WHERE THE INDIVIDUAL OFFICER IS FOUND NOT GUILTY OF USING EXCESSIVE FORCE.

II.

WHETHER THE COURT OF APPEALS CORRECTLY CONCLUDED THAT PETITIONER'S RIGHT OF ACCESS TO THE COURTS WAS NOT VIOLATED BY THE OFFICERS' ALLEGED FAILURE TO (1) LIST WITNESSES, (2) DOCUMENT PETITIONER'S INJURIES, AND (3) ADMIT TO HAVING USED EXCESSIVE FORCE IN THEIR REPORTS.

III.

WHETHER THE COURT OF APPEALS CORRECTLY AFFIRMED THE DISTRICT COURT'S DENIAL OF PETITIONER'S TARDY ATTEMPT TO PURSUE AN UNREASONABLE SEIZURE CLAIM UNDER *BROWER v. COUNTY OF INYO*, 489 U.S. 593 (1989).

IV.

WHETHER THE COURT OF APPEALS CORRECTLY AFFIRMED THE DISTRICT COURT'S REFUSAL TO JOIN ANOTHER PARTY TO THE CASE.

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REASONS WHY CERTIORARI SHOULD BE DENIED

I.

NO INTER-CIRCUIT CONFLICT EXISTS OVER THE APPLICATION OF *CITY OF LOS ANGELES v. HELLER*, 475 U.S. 796 (1986) TO THE CIRCUMSTANCES OF THIS CASE.

The Seventh Circuit correctly held that *City of Los Angeles v. Heller*, 475 U.S. 796 (1986) barred Petitioner's municipal liability claim. In *Heller*, the Court held that a municipality cannot be held liable for condoning excessive force where a jury rejected the plaintiff's claim of excessive force against the individual officer. *Id.* at 798. In doing so, the Court stated that "this was an action for damages, and neither *Monell v. New York City Dept. of Social Services*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed. 2d 611 (1978), nor any other of our cases authorizes the award of damages against a municipal corporation based on the actions of one of its officers when in fact the jury has concluded that the officer inflicted no constitutional harm." *Id.* at 799. The Court further added that "[if] a person has suffered no constitutional injury at the hands of the individual police officer, the fact that the departmental regulations might have *authorized* the use of constitutionally excessive force is quite beside the point." *Id.* (emphasis in original).

As in *Heller*, the jury in the instant case returned a verdict for the individual defendant, Officer Boggs, on Petitioner Thompson's excessive force claim. *Thompson v. Boggs*, 33 F.3d 847, 851 (7th Cir. 1994). The District Court had previously granted summary judgment in favor of the City of Havana (City) on Petitioner's municipal liability claim, which was premised on the City's failure

to discipline Officer Boggs for prior alleged instances of excessive force against other citizens. The Seventh Circuit found it unnecessary, in light of *Heller*, to review the propriety of the grant of summary judgment to the City because "the jury verdict in favor of Officer Boggs on the question of whether he used excessive force precludes the possibility that Thompson could prevail on his *Monell* claim." *Thompson*, 33 F.3d at 859.

Petitioner's attempt to establish an inter-circuit conflict as to the application of *Heller* under these circumstances is misdirected. First, he erroneously relies upon *Parrish v. Luckie*, 963 F.2d 201, 203 (8th Cir. 1992), which is entirely inapposite because the police officer defendant in that case was found to have deprived the plaintiff of her constitutional rights. *See Robinson v. City of St. Charles, Mo.*, 972 F.2d 974, 977 n.3 (8th Cir. 1992) (applying *Heller* and distinguishing *Parrish* because the defendant police officers did not violate the plaintiff's constitutional rights).

Second, Petitioner's reliance on *Moss v. City of Colorado Springs*, 871 F.2d 112, 114 (10th Cir. 1989) is particularly puzzling. In *Moss*, the Tenth Circuit actually applied *Heller* to overturn a verdict against a city on an illegal search claim where the jury had returned a verdict in favor of the individual police officers on the same claim. In doing so, the court acknowledged that the municipality might have been liable if the individual defendants had escaped liability on the basis of an affirmative defense, such as qualified immunity, which was unavailable to the municipality. *Id.* at 114. A contrary rule would permit municipalities to circumvent, through reliance on *Heller*, this Court's determination that a municipality is not entitled to assert an immunity defense. *See Owen v. City of Independence*, 445 U.S. 622, 638 (1980). However, since the jury was not instructed on any affirmative defenses,

the *Moss* court concluded that "[t]he officers were in the same position as the City on this point. . . . [and] the jury, it would appear, imposed liability on the City despite a conclusion that the officers were not guilty of a constitutional violation." *Id. See also Hinton v. City of Elmwood, Kan.*, 997 F.2d 774, 782 (10th Cir. 1993) (holding that since the officers' conduct did not give rise to a constitutional violation, the court did not "need to reach the issue of whether the city acted with deliberate indifference"); *Apodaca v. Rio Arriba County Sheriff's Dept.*, 905 F.2d 1445, 1447 (10th Cir. 1990) ("[w]hen there is no underlying constitutional violation by a county officer, there cannot be an action for failing to train or supervise the officer.")

Similarly, Respondent Boggs did not avoid liability on Petitioner Thompson's excessive force claim on the basis of qualified immunity or any other affirmative defense, but rather, he prevailed on the basis of a jury verdict rejecting Thompson's constitutional claim for excessive force. Consistent with *Moss*, therefore, any verdict against the City on Thompson's excessive force claim would have been inappropriate.

Finally, Petitioner's reliance on *Fagan v. City of Vineland*, 22 F.3d 1283 (3d Cir. 1994), is also misdirected. In *Fagan*, the court held that a municipality could be liable under § 1983 for deliberate indifference in training its police officers in pursuit techniques even if the individual officer did not violate principles of substantive due process because his conduct was not so egregious as to "shock the conscience." *Id.* at 1292.

Unlike *Heller* and the instant case, *Fagan* involved a scenario in which the threshold of proof needed to prove a claim against the individual officer was greater than

what was needed to prove a claim against the municipality. Poor training in pursuit techniques can foreseeably lead to car accidents even where the officer's own conduct was appropriate, or merely negligent, and thus, constitutionally sound. In such cases, it arguably makes less sense to allow the city to avoid liability for deliberately indifferent training procedures simply because the officer's conduct was not so egregious as to "shock the conscience." *But see Temkin v. Frederick County Com'rs*, 945 F.2d 716, 724 (4th Cir. 1991) (no municipal liability for inadequate pursuit training absent a constitutional violation by inadequately trained officer), *cert. denied*, 502 U.S. 1095 (1992); *Roach v. City of Fredericktown, Mo.*, 882 F.2d 294, 297-98 (8th Cir. 1989) (same).

In the excessive force context, by contrast, it would be illogical to hold a municipality responsible for condoning unreasonable force when it has been determined that the Plaintiff was not a victim of excessive force. Liability under those circumstances would contravene the principle that a § 1983 plaintiff must establish a compensable injury as a precondition to recovery. *See, e.g., Memphis Comm. School Dist. v. Stachura*, 477 U.S. 299 (1986).

In light of that discussion, any inter-circuit conflict concerning whether *Heller* applies where the elements of the municipal liability claim are less stringent than and independent of the elements of the claim against the individual officer, is not implicated in the excessive force context, where the opposite is true. Municipal liability for condoning excessive force is, by nature, dependent on a finding that the plaintiff was subjected to the use of unreasonable force. For that reason, no court has ever held that *Heller* is inapplicable to a claim alleging municipal liability for a police officer's use of unreasonable force in arrest.

II.

ANY INFORMAL MUNICIPAL POLICY CONDONING EXCESSIVE FORCE WAS IRRELEVANT TO PETITIONER'S EXCESSIVE FORCE CLAIM AGAINST OFFICER BOGGS.

Petitioner contends that *Heller* did not precisely address whether "an informal municipal policy of deliberate indifference to excessive force [is] relevant to the determination of whether an individual officer in fact used excessive force" (Pet. Br., p. 17). For that reason, Petitioner argues that the district court's grant of summary judgment in favor of the City interfered with his ability to prove his individual claim for excessive force against Officer Boggs at trial. Essentially, Petitioner sought to prove that Boggs used excessive force against him by introducing evidence of other incidents in which the City failed to discipline Boggs for allegedly using excessive force against other citizens. In support of that effort, Petitioner boldly states, with no citation to authority, that an "informal" municipal policy of deliberate indifference to the use of excessive force "makes it more likely that an individual officer in fact used excessive force" (Pet. Br., p. 19).

Petitioner's argument lies in direct contravention of Federal Rule of Evidence 404(b), which provides that "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." Fed. R. Evid. 404(b). The principle behind this rule is "that evidence of crimes or acts other than those charged should not be admissible merely to show that the defendant, having committed other bad acts, has a propensity toward crime or bad character." *U.S. v. Torres*, 977 F.2d 321, 325 (7th Cir. 1992). Courts have commonly applied Rule 404(b) to prevent plaintiffs in excessive force cases from introducing evidence of a police officer's prior alleged acts of excessive

force in order to prove that the police officer acted in conformity with those acts on a particular occasion. *See, e.g., Sherrod v. Berry*, 827 F.2d 195, 206 (7th Cir. 1987), *vacated*, 835 F.2d 1222 (7th Cir.), *rev'd on other grounds*, 856 F.2d 802 (7th Cir. 1988); *Robinson v. City of St. Charles, Mo.*, 972 F.2d 974, 976 (8th Cir. 1992); *Perri v. Daggy*, 776 F.Supp. 1345, 1348 (N.D. Ind. 1991); *Eigeman v. City of Great Falls*, 723 F.Supp. 522, 525 (D. Mont. 1989).

Yet, that is exactly what Petitioner seeks to accomplish in this case. The evidence proffered by Petitioner consisted of the City's allegedly insufficient response to six alleged incidents of excessive force committed by Officer Boggs over the course of twenty months and its failure to act on a "petition signed by 51 citizens complaining of Officer Boggs' use of excessive force" (Pet. Br., p. 9). Through such evidence, Petitioner clearly sought to persuade the jury that "where there's smoke, there's fire", in direct contravention of Rule 404(b). Petitioner's proffered evidence of municipal liability was thus inadmissible under Rule 404(b) against Officer Boggs.[1] Accordingly, the court of appeals correctly concluded that any alleged error in granting the City's Motion for Summary Judgment on the municipal liability claim would have been harmless in light of the subsequent jury verdict in favor of Officer Boggs and this Honorable Court's decision in *City of Los Angeles v. Heller*, 475 U.S. 796 (1986).

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[1] Petitioner does not allege that any of the six alleged incidents on which he relies were ever proven or resulted in a civil or criminal conviction such that their admissibility would be governed by standards other than those encompassed within Rule 404(b). *See* Fed. R. Evid. 609 (governing admissibility of prior convictions).

III.

THE COURT OF APPEALS CORRECTLY CONCLUDED THAT PETITIONER'S RIGHT OF ACCESS TO THE COURTS WAS NOT VIOLATED BY THE OFFICERS' ALLEGED FAILURE TO (1) LIST WITNESSES, (2) DOCUMENT PETITIONER'S INJURIES, AND (3) ADMIT TO HAVING USED EXCESSIVE FORCE IN THEIR REPORTS.

Petitioner claims the Court of Appeals erroneously upheld the dismissal of his right of access to the courts claim. Specifically, Petitioner claims that the Respondent officers shielded key facts from him by (1) omitting certain witnesses from their reports, (2) failing to document Petitioner's injuries, and (3) failing to document the fact that Officer Boggs allegedly "lift[ed] the plaintiff, who was lying semi-conscious on the pavement posing no threat of injury or escape and threw him down on the pavement onto his back with great force" (Pet. Br., pp. 5-6).

A citizen's right of access to the courts is guaranteed under both the First and Fourteenth Amendments. *See Armstrong v. Manzo*, 380 U.S. 545, 552 (1965); *Bounds v. Smith*, 430 U.S. 817, 822 (1977). The primary focus in these types of cases is whether the conduct of the governmental actor impeded the citizen's "adequate, effective and meaningful" access to the courts. *Bounds*, 430 U.S. at 822. A plaintiff must show that the defendant's conduct actually impeded his ability to pursue his case. *See e.g., Howland v. Kilquist*, 833 F.2d 639, 642 (7th Cir. 1987); *Jones v. Franzen*, 697 F.2d 801, 803 (7th Cir. 1983).

In rejecting Petitioner's right of access claim, the Court of Appeals correctly pointed out that the essential facts which formed Petitioner's excessive force claim were known to him at the time of the incident, and thus, the

officers' alleged omissions did not effectively impede his access to the courts. 33 F.3d at 852. Although Petitioner points out that he claimed he was only "semi-conscious" throughout the whole ordeal, he has not contended that his state of consciousness interfered with his perception of events on the day of his encounter with Respondents. Indeed, Petitioner's allegations of excessive force were based on his personal perceptions of the events on the day of the incident. Moreover, Petitioner was able to learn the extent of his injuries from medical personnel.

Petitioner incorrectly argues that the dismissal of his right of access claim was inconsistent with three federal circuit court decisions. In both *Bell v. City of Milwaukee*, 746 F.2d 1205 (7th Cir. 1984) and *Ryland v. Shapiro*, 708 F.2d 967, 973 (5th Cir. 1983), the defendant governmental officials allegedly participated in lengthy cover-ups of the true facts surrounding the murder of a citizen. Concluding in *Bell* that the cover-up denied the victim's survivors access to the courts for approximately twenty years, the Seventh Circuit stated that "[after] the reckless and completely inexcusable killing by a police officer, instead of searching for and revealing the true circumstances the conspirators did everything in their power to cover up and conceal the facts within their sole control." *Bell*, 746 F.2d at 1264. Similarly, in *Ryland*, the court remanded the case for a determination of whether the parents of a victim were denied access to the court due to a conspiracy by district attorneys to cover-up the victim's murder for eleven months. *Ryland*, 708 F.2d at 969, 972-73.

In marked contrast to the two cases Petitioner analogizes to, the Petitioner did not need to rely on the police reports to obtain access to the courts. Although Petitioner contends the court of appeals has set up a bright line distinction conditioning right of access claims on the victim's

death, the lower court did no such thing. To the contrary, the court simply acknowledged that a right of access claim requires proof that access to the courts was, in fact, impeded. The death of the victim can obviously play a large role in that determination. Without the victim's testimony, survivors are often at the mercy of the involved governmental actors, particularly in the absence of independent witnesses. Under those circumstances, a police cover-up of the true facts is far more likely to derail the filing of a lawsuit, than where, as here, the victim is able to recount his version of events.

Petitioner also relies erroneously on the Fifth Circuit's decision in *Hale v. Townley*, 19 F.3d 1068 (5th Cir. 1994). After succeeding on his initial § 1983 suit against two law enforcement officials, the plaintiff in *Hale* again filed suit, alleging that the defendant officers attempted to frame him for criminal activity in retaliation for his successful lawsuit. *Id.* at 1071. These allegations were held sufficient to state a cause of action for interference with the plaintiff's right of access to the courts. *Id.* at 1072.

In contrast to *Hale*, the case at bar does not involve retaliation against Petitioner for filing a prior lawsuit or for any other conduct. Therefore, *Hale* provides no support for Petitioner's attempt to pursue a right of access claim.

In sum, Petitioner has simply never alleged that any of the Respondents' alleged omissions actually impeded his access to the courts. That the fact alone fully supported the dismissal of his right of access claim.

IV.

THE COURT OF APPEALS CORRECTLY AFFIRMED THE DISTRICT COURT'S DENIAL OF PLAINTIFF'S TARDY ATTEMPT TO PURSUE AN UNREASONABLE SEIZURE CLAIM UNDER *BROWER v. COUNTY OF INYO,* 489 U.S. 593 (1989).

Petitioner contends the court of appeals improperly upheld the district court's denial of his efforts to present an unreasonable seizure claim to the jury based upon Officer Noble's use of his squad car to stop Petitioner's motorcycle and this Court's decision in *Brower v. County of Inyo*, 489 U.S. 593 (1989).

"Leave to amend the pleadings may be denied for 'apparent or declared reasons' such as 'undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, futility of the amendment, etc.' " *Foman v. Davis*, 371 U.S. 178, 182 (1962). Moreover, "granting or denying a motion for leave to file an amended pleading is a matter purely within the sound discretion of the district court." *J.D. Marshall Int'l, Inc. v. Redstart, Inc.*, 935 F.2d 815, 819 (7th Cir. 1991) (citing *Foman*, 371 U.S. at 182).

Despite that wide discretion, Petitioner distorts Seventh Circuit precedent to conclude that he had an absolute entitlement to pursue, at trial, all claims which were suggested during discovery, regardless of when he sought to plead those claims, if ever. Petitioner relies on *Ash v. Wallenmeyer*, 879 F 2d 272 (7th Cir. 1989), for the proposition that "it was not necessary for a plaintiff to amend his complaint to assert additional claims arising out of the occurrence referred to in the complaint." (Pet. Br., p. 27).

Contrary to Petitioner's assertion, *Ash* did not dispense with the requirement that a pleader must plead his claims

against a defendant. *See* Fed. R. Civ. P. 8. *Ash* simply concluded that where the nature of a proposed amendment was already apparent from the pleadings on file, a defendant who is not surprised or prejudiced by the amendment cannot rely on the delay in order to defeat the claim. *Ash*, 879 F.2d at 274. Also, in *Ash*, the amendment concerned only the amount of damages sought. *Id.*

In the present case, by contrast, the district court was well within its discretion in concluding that the Respondents were surprised and prejudiced by Petitioner's eleventh hour attempt to add a brand new substantive claim. While Petitioner's purported *Brower* claim focused on the chase and the collision between Officer Noble's squad car and Petitioner's motorcycle, all three of Petitioner's complaints had alleged claims based upon his encounter with Officer Boggs, which took place well after the collision had already occurred. The mere allegation that Officer Noble had positioned his vehicle to stop Plaintiff's motorcycle was clearly insufficient to alert either Respondents or the district court to Petitioner's intent to pursue a *Brower* claim. Accordingly, the district court was well within its discretion in concluding that the assertion of such a claim on the eve of trial would have significantly expanded the scope of the trial and exposed Respondents to an entirely different set of risks not ascertainable from the pleadings.

Moreover, as the court of appeals noted, Petitioner did not seek to add his unreasonable seizure claim under *Brower v. County of Inyo*, 489 U.S. 593 (1989), for "some three years and nine months after the collision between Thompson's motorcycle and Officer Noble's squad car, and less than one month before . . . trial was convened." 33 F.3d at 853. This delay was unjustifiable because the facts underlying the unreasonable seizure claim were known to

Petitioner at the time he filed his original complaint. *Id.* Even if Petitioner was correct in his assertion that he did not know all the facts to support a *Brower* claim until the officers' depositions in late 1992, he has not even attempted to explain his failure to alert either Respondents or the district court to his intention to pursue a *Brower* claim until the eve of trial, some six months later. In light of those circumstances, the district court correctly prohibited Petitioner from pursuing a brand new substantive claim at trial which was wholly separate from the excessive force and right of access claims he had previously alleged.

Finally, Petitioner inappropriately states that the court of appeals mischaracterized the record in referring to his tardy attempt to amend the complaint because he "never moved for leave to amend his second amended complaint" (Pet. Br., p. 27). The use of semantics to accuse a federal circuit court of appeals of "mischaracterizing the record" is a highly objectionable practice. Whether Petitioner formally petitioned the court for leave to replead is immaterial, in light of the fact that Petitioner indisputably attempted to persuade the district court to entertain his unreasonable seizure claim under *Brower*.

Moreover, the court of appeal's conclusion that Petitioner did, in fact, seek to amend his Second Amended Complaint is certainly supported by the record. Specifically, a June 22, 1993 order entered by the district court read, in part: "[i]n this case, after completion of discovery and on the eve of trial, Plaintiff seeks to amend the pleadings to include a brand new cause of action which he asserts was unknown to him prior to the completion of his expert's and Officer Noble's and Chief Hardesty's depositions. The Court disagrees that Plaintiff could only have learned of this claim during discovery. . . . Consequently, the Court finds that justice does not require that

Plaintiff be allowed to amend the pleadings to reflect a claim under *Brower*" (*See* Appendix A, District Court Order, June 22, 1993, p. 3).

Regardless of whether Petitioner formally sought to amend the pleadings, or whether he carelessly sought to pursue the new claim without bothering to seek a formal amendment, the court of appeals correctly upheld the district court's refusal to entertain Petitioner's tardy *Brower* claim.

V.

THE COURT OF APPEALS PROPERLY AFFIRMED THE DISTRICT COURT'S REFUSAL TO JOIN ANOTHER PARTY TO THE CASE.

Petitioners Thompson and Bailey both contend that the court of appeals incorrectly affirmed the district court's refusal to add Bailey to the lawsuit as an additional Plaintiff (Pet. Br., p. 30).

The district court has wide discretion concerning the joinder of parties. *See, e.g., Intercon Research Associates, Ltd. v. Dresser Industries, Inc.*, 696 F.2d 53, 56 (7th Cir. 1982). A party may be joined if he has a right arising out of the same transaction or series of transactions as the initial plaintiff, and "if any question of law or fact common to all these persons will arise in the action." Fed. R. Civ. P. 20(a); *See also Intercon*, 696 F.2d at 56-7.

In the instant case, the district court properly denied the joinder of another party to the case. Petitioner Bailey alleged an incident of excessive force completely independent of Petitioner Thompson's claim which occurred almost two years after Thompson's encounter with Respondents. Furthermore, Bailey's claim involved a completely different set of facts and additional Defendants. As the

Seventh Circuit noted, "adding Bailey to the lawsuit would only serve to confuse the jury by trying two separate and distinct injury claims." 33 F.3d at 858.

Petitioner incorrectly relies on Wright & Miller for the proposition that "no prior case has ever denied joinder of plaintiffs in a civil rights case alleging separate injury by the same policy" (Pet. Br., p. 30). On the contrary, Wright & Miller simply states generally that joinder has been allowed in cases involving violations of federal statutes, including the Civil Rights Act. 7 Wright, Miller & Kane, *Federal Practice and Procedure*, § 1656, p. 398, n. 23 & 26 (1994 Supp. n. 25, p. 39). At no time does Wright & Miller retreat from the rule conditioning joinder on a showing of a right arising out of the same transaction or series of transactions which gave rise to the original Plaintiff's claim.

In this case, the transactions giving rise to Petitioners' claims took place more than two years apart. The incidents had nothing in common other than the fact that Respondent Boggs was involved in both incidents. The sole fact of a common Defendant is far too tenuous a thread on which to seek joinder. Accordingly, the Seventh Circuit did not err when it affirmed the district court's decision to deny Brad Bailey's motion to join Petitioner Thompson's suit.

CONCLUSION

The Petition For a Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX A

[Filed June 22, 1993]

IN THE
UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF
ILLINOIS—SPRINGFIELD DIVISION

ROBERT THOMPSON,	)	
	)	
Plaintiff,	)	
v.	)	
	)	
	)	No. 91-3196
ROD BOGGS, a Police Officer of the City of Havana, in His Individual Capacity, et al.,	)	
	)	
Defendants.	)	

ORDER

RICHARD MILLS, District Judge:

This cause is before the Court on the parties' cross-motions for partial summary judgment pursuant to Fed. R. Civ. P. 56, and Plaintiff's motion to strike certain material submitted by Defendants in their response to his motion pursuant to Rule 56(e). The Court has previously detailed the facts of this case in its order of October 28, 1991; consequently, they will not be repeated.

Plaintiff contends that due to the depositions of Defendant Officer Noble and Chief Hardesty taken on December 4, 1992 and December 10, 1992 respectively, and the

opinion of his expert Mr. Ken Katsaris, he is entitled to summary judgment for a claim of unreasonable seizure arising from Defendant Noble's use of his squad car to block Plaintiff from successfully escaping from the police through the hospital parking lot. Defendants assert that Plaintiff's claim for unreasonable seizure is barred by the statute of limitations since it has been raised for the first time approximately three years and nine months after the initial occurrence. In addition, Defendants argue that a question of fact remains over whether Officer Noble's acts were reasonable. Finally, Defendants maintain that the City and Chief Hardesty are not liable for Officer Noble's actions. Plaintiff counters that the portion of Defendants' response which calculates that he had sufficient time to stop without hitting the roadblock should be stricken as inadmissible hearsay.

Initially, the Court disagrees with Officer Noble's assertion that he was dismissed from the case because the only claims against him, falsifying a police report and not reporting Officer Boggs' alleged use of excessive force to his superiors, were dismissed. The complaint clearly states at ¶ 43 that Officer Noble violated Plaintiff's right to be free from unreasonable searches and seizures when he failed to prevent Officer Boggs' excessive use of force at the scene. Moreover, the Court never dismissed Officer Noble from this case. Thus, the issue is whether this claim gives Defendants' notice of Plaintiff's roadblock/seizure claim, and, if not, whether the Court will allow Plaintiff to amend the pleadings on the eve of trial.

The claims specifically alleged against Officer Noble in Plaintiff's complaint are for violations of the Plaintiff's right to be free from unreasonable searches and seizure due to Officer Noble's failure to prevent Officer Boggs' use of excessive force, and for a violation of Plaintiff's

right to access to the courts. Moreover, Plaintiff's own outline of his claims contained within his second amended complaint mentions only that Officer Noble violated the Fourth Amendment for failing to prevent a fellow officer's use of excessive force and that he denied Plaintiff access to the courts. (Plaintiff's Response to Defendant's Motion to Dismiss Second Amended Complaint, at 2). The latter claim was dismissed by the Court on May 7, 1992.

The Federal Rules allow the amendment of pleadings providing the other party is not prejudiced. This case is distinguishable from *Ash v. Wallenmeyer*, 879 F.2d 272 (7th Cir. 1989), cited by Plaintiff to support his contention that his claim for unreasonable seizure should be allowed. In *Ash*, Plaintiff moved to amend the amount of damages sought, not the underlying claim. *Ash*, 879 F.2d at 274.

In this case, after completion of discovery and on the eve of trial, Plaintiff seeks to amend the pleadings to include a brand new cause of action which he asserts was unknown to him prior to the completion of his expert's and Officer Noble's and Chief Hardesty's depositions. The Court disagrees that Plaintiff could only have learned of this claim during discovery. Rather, Plaintiff was aware that Officer Noble used his car as a roadblock from the beginning of the case. Moreover, the case of *Brower v. County of Inyo*, 109 S. Ct. 1378 (1989), which Plaintiff states allows his claim for unreasonable seizure due to the use of a roadblock to stop him, was decided prior to the filing of this suit. Consequently, the Court finds that justice does not require that Plaintiff be allowed to amend the pleadings to reflect a claim under *Brower*.

Additionally, Court notes that under *Monell v. Dept. of Social Serv.*, 436 U.S. 658 (1978) and *Jones v. Chicago*, 856 F.2d 985 (7th Cir. 1988), the City and Chief Hardesty

would not be liable because there is no evidence of a custom, policy, or practice concerning improper roadblocks and no evidence that Chief Hardesty acted with deliberate, reckless indifference with respect to procedures concerning police roadblocks.

Ergo, Plaintiff's motion for partial summary judgment (d/e 46) is DENIED. Plaintiff will not be allowed to amend his pleadings at this late date to include a claim for unreasonable seizure against Defendant Noble. Plaintiff's motion to strike (d/e 66) is DENIED. Defendants' motion for summary judgment (d/e 63) is DENIED as moot.

ENTER: 22 June, 1993
FOR THE COURT:

/s/ Richard Mills
United States District Judge